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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/884,674	06/19/2001	Jim Chu	884.441US1	3214
7590	06/19/2006		EXAMINER	
Schwegman, Lundberg, Woessner & Kluth, P.A.			LEE, PHILIP C	
P.O. Box 2938				
Minneapolis, MN 55402			ART UNIT	PAPER NUMBER
			2152	

DATE MAILED: 06/19/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

09/884,674

Applicant(s)

CHU ET AL.

Examiner

Philip C. Lee

Art Unit

2152

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 30 March 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-11 and 19-30 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-11 and 19-30 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

1. This action is responsive to the amendment and remarks filed on March 30, 2006.
2. Claims 1, 3-11 and 19-30 are presented for examination.
3. The text of those sections of Title 35, U.S. code not included in this office action can be found in a prior office action.

*Claim Rejections - 35 USC 112*

4. Claims 1, 3-11 and 19-30 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
  - a. Claim language in the following claims is not clearly understood:
    - i. As per claim 1, lines 2-4, it is unclear how to “selectively” determine [i.e. select what sources to measure, or select if the size should be a criteria for determining an empirical measurement]; it is also uncertain what is meant by “selectively” [i.e. “selectively” is indefinite, select all of the sources, select none of the sources].
    - ii. As per claim 8, line 4, it has the same problem as in claim 1 above.
    - iii. As per claim 21, lines 7-9, it has the same problem as in claim 1 above.
    - iv. As per claim 25, lines 4-6, it has the same problem as in claim 1 above.

- v. As per claim 28, lines 4-7, it has the same problem as in claim 1 above.

*Claim Rejections - 35 USC 103*

5. Claims 1, 3-11, 19-20 and 25-29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens et al, U.S. Patent 6,606,643 (hereinafter Emens) in view of Ramanathan et al, U.S. Patent 5,913,041 (hereinafter Ramanathan)
6. Emens and Ramanathan were cited in the last office action.
7. As per claim 1, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:
- determining an empirical measurement of a performance of each of the plurality of sources (col. 3, lines 47-58);
- selecting a source in reference to the empirical measurement of the performance of each of the plurality of sources (col. 3, line 66-col. 4, line 3); and
- initiating a download of data from a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).
8. Emens did not teach determining according to a size of data to be obtained. Ramanathan taught the method comprising selectively determining empirical measurement according to a size of data to be obtained (col. 3, lines 15-27).

9. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selectively determining an empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

10. As per claims 8 and 10, Emens taught the invention substantially as claimed for managing a plurality of sources, wherein executable instructions capable of directing a processor to perform:

determining an empirical measurement of a throughput speed of each of the plurality of sources (col. 3, lines 47-58);

selecting a source in reference to the empirical measurement of the throughput speed of each of the plurality of sources (col. 3, line 66-col. 4, line 3) (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to the specification, page 17, lines 1-7, if the size of the transmission and response is equal for each source tested.) ; and

initiating a download of data from a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

11. Emens did not teach determining according to a size of data to be obtained. Ramanathan taught the method comprising selectively determining empirical measurement according to a size of data to be obtained (col. 3, lines 15-27).

12. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selectively determining an empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

13. As per claim 25, Emens taught the invention substantially as claimed for managing sources in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22) comprising:

a processor (inherently comprised); and

software means operative on the processor for determining an empirical measurement of a throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66- col. 4, line 3);

the software means selecting a source in reference to the empirical measurements of the throughput speed of each of the plurality of sources (col. 3, lines 47-58; col. 3, line 66- col. 4, line 3); and

a transmitter to initiate a download of data to a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

14. Emens did not teach determining according to a size of data to be obtained. Ramanathan taught the method comprising software means for selectively determining empirical measurement according to a size of data to be obtained (col. 3, lines 15-27); and software means including obtainer means to obtain an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

15. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selectively determining an empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

16. As per claim 28, Emens taught the invention substantially as claimed comprising:  
a determiner (e.g. the calibration applets) of an empirical measurement of a throughput speed of each of the plurality of download peer-to-peer network sources (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22; col. 7, lines 44-54);  
a selector (e.g. the calibration manager) of a source in reference to the empirical measurement of the throughput speed of each of the plurality of peer-to-peer network sources (col. 7, lines 44-54); and

a transmitter to initiate a download of data to a download source of the plurality of peer-to-peer network sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

17. Emens did not teach determining according to a size of data to be obtained. Ramanathan taught the method comprising selectively determining empirical measurement according to a size of data to be obtained (col. 3, lines 15-27); and determining an empirical measurement of a throughput speed of each of the plurality of sources from at least one third-party source (e.g. content server) (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

18. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selectively determining an empirical measurement according to a size of data to be obtained would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

19. As per claim 3, Emens and Ramanathan taught the invention substantially as claimed in claim 1 above. Ramanathan further taught obtaining an empirical measurement of a throughput speed of each of the plurality of sources from a local source (col. 3, lines 43-58; col. 6, lines 38-49). (Note that the throughput speed is interpreted as the throughput time (i.e. roundtrip time) as defined according to the specification, page 17, lines 1-7, if the size of the transmission and response is equal for each source tested.)



20. As per claim 4, Emens and Ramanathan taught the invention substantially as claimed in claim 1 above. Ramanathan further taught that the performance includes throughput speed (col. 3, lines 43-58; col. 5, lines 48-51; col. 6, lines 38-49).

21. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's method of obtaining the throughput speed would increase the accuracy of Emens's system by providing a measure rate at which data is transferred between server system and a remote personal computer of a subscriber (col. 1, lines 60-65).

22. As per claims 5 and 27, Emens and Ramanathan taught the invention substantially as claimed in claims 1 and 25 above. Emens further taught wherein the performance comprises latency (col. 3, lines 55-56).

23. As per claim 6, Emens and Ramanathan taught the invention substantially as claimed in claim 5 above. Emens further taught wherein the determining the empirical measurement further comprises:  
measuring the elapsed time of a transmission involving each of the plurality of sources (col. 3, lines 56-58).

24. As per claims 7, 11 and 20, Emens and Ramanathan taught the invention substantially as claimed in claims 5, 8 and 10 above. Emens and Ramanathan further taught wherein the determining the empirical measurement further comprises for each of the plurality of sources:

recording transmission time from the current time and date (see Ramanathan, col. 5, lines 52-62);

initiating a transmission to a download source of the plurality of sources (see Emens, col. 3, lines 49-51);

receiving a response to the transmission from the source (see Emens, col. 3, lines 51-53);

recording the receipt time from the current date and time (see Ramanathan, col. 5, lines 52-62); and

determining the throughput speed of the source from the difference between the receipt time and the transmission time (see Emens, col. 3, lines 56-58; col. 5, lines 42-49).

25. As per claim 9, Emens did not teach comprising a download speed. Ramanathan taught wherein the throughput speed further comprises a download speed (col. 2, lines 9-13).

26. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's method of obtaining the throughput speed would increase the accuracy of Emens's system by providing a measure rate at which data is transferred between server system and a remote personal computer of a subscriber (col. 1, lines 60-65).

27. As per claim 19, Emens and Ramanathan taught the invention substantially as claimed in claim 8 above. Emens further taught wherein source further comprises a source in a peer-to-peer network (i.e. data can be exchange freely between two computer) (col. 4, lines 19-22).

28. As per claim 26 Emens and Ramanathan taught the invention substantially as claimed in claim 25 above. Emens further taught wherein the throughput speed further comprises a round-trip time (col. 5, lines 48-49).

29. As per claim 29, Emens and Ramanathan taught the invention substantially as claimed in claim 28 above. Emens further taught comprising:

a transmitter (e.g. the calibration applets) to transmit a message to a download source of the plurality of sources (col. 3, lines 49-51);

a recorder (e.g. timer) of the time of a transmission of a message, operably coupled to the transmitter (col. 5, lines 42-45);

a receiver of a response to the transmission from the source, operably coupled to the transmitter (col. 3, lines 51-53);

a recorder (e.g. timer) of the time of receipt of a response (col. 5, lines 42-45); and  
a determiner (e.g. the calibration manager) of the throughput speed of the source, from the difference between the receipt time and the transmission time (col. 3, lines 56-58; col. 5, lines 42-49).

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30. Claims 21-24 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Emens and Ramanathan in view of Andrews et al, U.S. Patent Application Publication 2002/0038360 (hereinafter Andrews).

31. Andrews was cited in the last office action.

32. As per claim 21, Emens taught the invention substantially as claimed for managing a plurality of sources comprising:

obtaining a list comprising a plurality of identification of sources (col. 3, lines 38-46);

initiating a plurality of connections, the plurality of connections further comprising one connection for each of the plurality of sources, yielding a plurality of initiated connections (col. 3, lines 48-51);

receiving a response for the each of the plurality of initiated connections, yielding a plurality of responses (col. 3, lines 51-53);

selecting a source of the plurality of sources in reference to the empirical measurement of performance (col. 3, line 66-col. 4, line 3); and

initiating a download of data from a download source of the plurality of sources (abstract; col. 1, lines 10-14; col. 8, lines 20-24; col. 9, lines 59-64).

33. Emens did not teach obtaining an empirical measurement according to a predetermined file size. Ramanathan taught the method comprising obtaining an empirical measurement according to a predetermined file size (col. 3, lines 15-27).

34. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of selectively determining an empirical measurement according to a predetermined file size would increase the accuracy of Emens's system by allowing performance evaluation based on the size of the transfer data(col. 3, lines 15-27).

35. Emens and Ramanathan did not teach socket connections. Andrews taught socket connections (i.e. three way handshake) could be measured for client accessing a content server (page 4, paragraphs 46 and 47). Note that it is inherent that a three-way handshake is to establish socket connection between a client and a server. The three-way handshake includes initiating a socket connection by using a synchronization (SYN message) and receiving a response (ACK message) for the initiated socket connection.

36. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of Emens's and Ramanathan's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

37. As per claim 22, Emens, Ramanathan and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

selecting the source associated with the response that is received first (col. 3, lines 47-58; col. 3, line 66-col. 4, line 6).

38. As per claim 23, Emens, Ramanathan and Andrews taught the invention substantially as claimed in claim 21 above. Emens further taught wherein the selecting further comprises:

measuring the latency of each of the plurality of sources (col. 3, lines 47-58); and  
selecting a source in reference to the download speed of each of the plurality of sources (col. 3, line 66-col. 4, line 6).

39. As per claim 24, Emens taught the invention substantially as claimed wherein measuring the latency further comprises:

storing the time of each of the plurality of initiating connection (col. 5, lines 42-45);  
storing the time of each of the plurality of responses (col. 5, lines 42-45); and  
determining the download speed of each of the plurality of sources from the differences in time between the time of each of the plurality of the responses and the time of each of the plurality of the initiating connections (col. 3, lines 56-58; col. 5, lines 42-49). Note that the download speed could be the throughput speed (i.e. or could be the throughput time if the size of the transmission and response is equal for each source tested according to the specification on page 17, lines 1-7) according to the specification, page 13, lines 1-4.

40. Emens did not teach including a date with the transmission time or the receipt time. Ramanathan taught the method of recording the time and date (col. 5, lines 52-62).

41. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens and Ramanathan because Ramanathan's teaching of recording the transmission date and receipt date would increase the alertness of Emens's system by allowing a user to monitor the transaction with the external network.

42. Emens and Ramanathan did not teach socket connections. Andrews taught socket connections (i.e. three way handshake) could be measured for client accessing a content server (page 4, paragraphs 46 and 47).

43. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of measuring the socket connections would increase the efficiency of Emens's and Ramanathan's systems by locating content servers in response to the minimal round trip time (page 1, paragraph 8).

44. As per claim 30, Emens and Ramanathan taught the invention substantially as claimed in claim 28 above. Emens and Ramanathan did not specifically detailing the establishment of the socket connection comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message. Andrews taught wherein the transmission further comprises a TCP/IP synchronized idle message (page 4, paragraph 47); and the response further comprises a TCP/IP acknowledgment message (page 4, paragraph 47).

45. It would have been obvious to one having ordinary skill in the art at the time of the invention was made to combine the teachings of Emens, Ramanathan and Andrews because Andrews's method of comprising a TCP/IP synchronized idle message and a TCP/IP acknowledgment message would increase the capability of Emens's and Ramanathan's systems by allowing establishment of a socket connection for accessing content on the server.

46. Applicant's arguments with respect to claims 1, 3-11 and 19-30, filed 3/30/06, have been fully considered but are not deemed to be persuasive.

47. In the remark applicant argued that

(1) the cited prior arts fail to teach selectively determining an empirical measurement according to a size of data to be obtained from the sources.

48. In response to point (1), Ramanathan teaches performance evaluation of the remote sites are based upon the calculation of data throughput to the subset, as calculated using the log information of transfer sizes (col. 3, lines 15-26).

49. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a). A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is

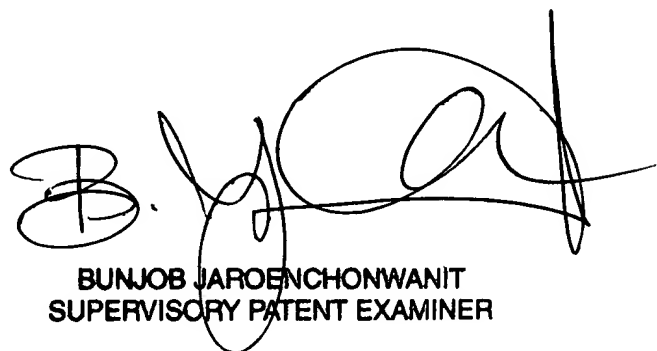


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not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Philip Lee whose telephone number is (571) 272-3967. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 305-9600.

Philip Lee

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SUPERVISORY PATENT EXAMINER